Supreme Court, U.S.
FILED
JUN 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1448

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner

v.

LAL R. BHAYA,
RICHARD CARNER,
WILLIAM J. HAESSLER,
HENRY A. PARZICK, and
EARLE WILLIAMS,
Respondents

REPLY BRIEF TO THE BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Rule 22.5 of the Rules of the Supreme Court provides that a petitioner may file a reply brief to respond to issues first raised in the brief in opposition. In this case, the brief in opposition, which has been styled "Response to Petition For Writ of Certiorari to the United States Court of Appeals for the Third Circuit," largely ignores the arguments made in support of the petition for certiorari and focuses instead on why plaintiffs believe the Court of Appeals for the Third Circuit correctly reversed the judgment notwithstanding the verdict. Although the brief in opposition is inappropriate, it nonetheless raises new issues which must be addressed.

COUNTERSTATEMENT OF THE FACTS

The recitation of the "facts" of this case found in the brief in opposition contains significant distortions of the record. In describing their own testimony, plaintiffs omit important inconsistencies. For example, while it is true that plaintiff, Henry Parzick, testified at trial that the jobs of Negotiation Engineer ("NE") and Availability Assurance Engineer ("AAE") were virtually interchangeable, this testimony directly contradicted statements made by him at his pretrial deposition. Defendant Westinghouse introduced at the trial the following testimony from Parzick's deposition:

> Q: Do you have any reason to believe that they [the Availability Assurance Engineers] were doing the same work that you were doing or different work?
>
> A: Their line of work was entirely different from mine. As I said, I assisted these people on a lot of their work.

(190a)[1]

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1. This is a reference to the record below, as submitted to the court of appeals. All such further references in this brief will include a number, followed by a lowercase "a".

The description of the testimony of Henry Parzick regarding the alleged statements of his supervisor, Thomas Kinlin, also is not accurate. The brief in opposition describes this testimony about alleged statements of Kinlin as follows:

> ". . . the testimony of Mr. Parzick revealed that high level managers of Westinghouse were aware that the plan to eliminate the job family of Negotiation Engineer might be "illegal" (discriminatory) but decided to take a chance in that regard."

(Brief in Opposition at p.12)

The following is the relevant testimony of record:

> A: Mr. Kinlin told me that at a meeting that management held at which he was present, a discussion was held regarding our termination. Somebody in that meeting brought up the point that they might be violating the labor laws of their contract.

(168a)

* * *

> A: A statement was made that maybe we [Westinghouse] shouldn't be eliminating this group [Negotiations engineers]. Maybe we're doing something illegal or against the contract, and Mr. Nick Kulokoski, who was the personnel manager of the division, said, let's give it a try. What do we have to lose?

(173a)

This testimony does not support plaintiffs' claim that a Westinghouse official described the decision to eliminate the position of NE as potentially discriminatory. In reversing the judgment n.o.v., the Third Circuit did not even mention this evidence.

William Haessler, another plaintiff, testified that he could do the work done by the AAEs. (238a-240a) On cross-examination, however, Mr. Haessler acknowledged that at the time of his layoff in December of 1982,

the job duties of the two positions were different. (262a-263a) Similarly, plaintiff, Earle Williams, testified that in 1982 there were differences between the job of AAE and NE. (360a)

Plaintiff, Richard Carner, also testified that at the time of his layoff in December 1982 his job was different from that of the AAEs. Indeed, at that time he was not even doing the work being done by the other NEs. (401a, 414a-416a) Mr. Carner also testified in a contradictory manner about his qualifications to do the work of the AAEs. Initially, he testified that he was more qualified than the AAE whose job he said he should have been given. Thereafter, he conceded that the AAE in question was more proficient at the job since he had been doing it. (423a) Also, Mr. Carner first testified that he was familiar with the work of the AAEs; however, subsequently he acknowledged: . . . I [didn't] know what their proficiency was. I wasn't in contact with them. I was doing work of my own, working with them. I wasn't watching what they were doing." (424a)

Plaintiff, Lal Bhaya, also gave the conflicting testimony about the similarity of his job duties to those of the Applications Engineers, the group of younger employees whom he identified as being treated more favorably than he. Bhaya first said that his work was the same as their work. Later, he testified that he didn't know exactly what the Applications Engineers did. (390a-392a)

The brief in opposition also mischaracterizes the testimony of plaintiffs' expert witness, Dr. Richard Andrulis. While it is true that Andrulis initially testified that, based on his review of job descriptions for the AAEs and the NEs, that the two jobs had similar responsibilities or requirements, this testimony was beyond the scope of Andrulis' alleged expertise. Plaintiffs offered him as an expert in the "area of industrial management and statistics" (295a), not as an expert on the nature of engineering jobs at Westinghouse. Indeed, Andrulis admitted that he did not do a "formal job analysis" of the

AAE position and that his only knowledge of the skills necessary for the two jobs was based on reading the job descriptions. (342a) Therefore, the contention in the brief in opposition that the testimony of Dr. Andrulis constituted evidence upon which the jury reasonably could have found that the duties of the two job positions were "interchangeable" is erroneous.

The brief in opposition also inaccurately describes the testimony of defense witness, Chester Turnbull. Mr. Turnbull testified that the collective bargaining agreement did not allow a transfer of duties from one job progression to another if the transfer necessitated a change in the job description. Mr. Turnbull explained why he believed that the job description of the NEs would have to be changed if they were to assume the duties of the AAEs (664a-675a), and his testimony is uncontradicted.[2]

ARGUMENT

I. The Court of Appeals Did Not Apply The Correct Standards

In a section of the brief in opposition entitled "Argument," plaintiffs offer five reasons why the petition for certiorari should be denied. Only the first argument, that "the court of appeals applied universally accepted principles of law governing actions under the Age Discrimination in Employment Act," is responsive to the petition for certiorari. Plaintiffs assert that they produced affirmative evidence of age discrimination, but they do not

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2. A copy of the collective bargaining agreement (national agreement) was entered into evidence as defendant's Exhibit 23. Language in that agreement supports Turnbull's claim that Westinghouse could not have transferred duties from the AAEs to the NEs if that transfer was so substantial as to require a revision of the job descriptions for the two positions. (Section VI at pp. 10-11 of D-23)

identify any such evidence other than their own testimony that they were qualified to do the work being done by younger engineers who were retained. This does not amount to affirmative evidence that would carry plaintiffs' burden to show that the business reasons offered by Westinghouse were a pretext for age discrimination.

In *Branson v. Price River Coal Co.*, ____ F.2d ____, 46 FEP Cases 1003 (10th Cir. 1988), the Tenth Circuit rejected similar evidence offered by the plaintiff in that age discrimination case. The Court of Appeals affirmed a grant of summary judgment in favor of the employer on the basis that plaintiff had failed to create a genuine issue of material fact regarding the non-discriminatory reasons offered by defendant for its decision to lay off plaintiff. The Court noted:

> [Plaintiff] admits Mr. Anderson "felt" she was less qualified than Mr. Hanson for the accounting department's remaining position and claims only that she was in fact equally or more qualified than Mr. Hanson. As courts are not free to second-guess an employer's business judgment, this assertion is insufficient to support a finding of pretext. See *Kephart v. Institute of Gas Technology*, 630 F.2d 1217, 1223, 23 FEP Cases 1412 (7th Cir. 1980), *cert. denied*, 450 U.S. 959, 24 FEP Cases 1827 (1981). *It is the perception of the decision maker which is relevant, not plaintiff's perception of herself, Smith v. Flax*, 618 F.2d 1062, 1067, 22 FEP Cases 1202 (4th Cir. 1980).

Id. at 1005 (emphasis supplied)

Under this reasoning, plaintiffs' opinion that they were qualified to do the work of the younger engineers who were retained is not sufficient to show that the elimination of their jobs was the result of age discrimination.

II. In Granting the Judgment N.O.V., the District Court Did Not Improperly Usurp the Function of the Jury

Plaintiffs/respondents also argue that this Court should deny the petition for certiorari because the Third Circuit correctly found that the trial court impermissibly usurped the function of the jury. Plaintiffs contend that the jury could have reasonably inferred from the evidence that they could have assumed the job duties of the AAEs and therefore concluded that Westinghouse had committed age discrimination.[3] This argument misses the point.

Assuming *arguendo* that there was sufficient evidence to support an inference that the job duties of the AAEs could have been transferred to the NEs, this inference does not support a finding of age discrimination. The fact that the defendant *could have* made another business decision does not show that the defendant violated the ADEA. The statute does not require an employer to devise ways to retain older employees and lay off younger employees during a reduction in force.

III. Plaintiffs Did Not Show Pretext

Plaintiffs also argue that the district court "impermissibly determined that plaintiffs had not sufficiently demonstrated pretext." They allege that, in granting the judgment n.o.v., the trial court improperly weighed conflicting evidence and evaluated witness credibility. In support of this position, plaintiffs cite two cases, *Carter v. Duncan-Huggins Ltd.*, 727 F.2d 1225 (D.C.

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3. The following assertion in the brief in opposition is a complete distortion of the record:

> "Since each of the Plaintiffs and Dr. Andrulis testified that the union contract and the circumstances present at their termination permitted the transfer of job duties to them . . ."

(brief in opposition at p.17) None of the plaintiffs nor Dr. Andrulis testified about the collective bargaining agreement. Indeed, Dr. Andrulis admitted that he had never read it. (343a-344a)

Cir. 1984) and *Lindsey v. American Cast Iron and Pipe Co.*, 772 F.2d 779 (11th Cir. 1985), neither of which is relevant to this case.

In *Carter v. Duncan-Huggins, Ltd., supra*, the court of appeals affirmed the denial by the district court of a motion for a judgment n.o.v. because the evidence of record clearly supported a finding of discriminatory motive on the part of the defendant employer. Unlike the plaintiffs in this case, Ms. Carter offered evidence of numerous specific examples of disparate and unfavorable treatment of her by defendant. As the lone black employee of defendant employer, she was singled out for unique treatment in all aspects of her employment, including salary, customer contact, position of her work station, participation in staff meetings and fringe benefits. 727 F.2d at 1233.

By contrast, in the instant case, the evidence submitted by plaintiffs established only that they were older than some employees with similar skills who were retained by defendant. The Third Circuit has said that ". . . replacement by someone younger, without more, will not give rise to an inference of age discrimination . . ." *Maxfield v. Sinclair International*, 766 F.2d 788, 792 (3d Cir. 1985), *cert. denied*, 474 U.S. 1067 (1985).

Plaintiffs' reliance on the decision in *Lindsey v. American Cast Iron and Pipe Company, supra*, is also misplaced. The Eleventh Circuit reversed the granting of a judgment n.o.v. to defendant in that age discrimination case largely because the lower court had applied improperly the *McDonnell Douglas Corp. v. Green* test to a case where there was direct evidence of discrimination. 772 F.2d at 801-02. In *Lindsey*, plaintiff testified that his supervisor told him that he would not be considered for a promotion because the company was looking for a younger person for that job. This evidence, if believed by the jury, was direct evidence of age discrimination. *Id.* at 802. There is not any such direct evidence in this case.

Plaintiffs also cite the *Lindsey* decision for the proposition that a plaintiff may prove his case by his initial evidence combined with evidence elicited from the defendant on cross-examination. Mr. Borden said on cross-examination that "there is some opinion by industry experts that the turbine generator business might come back in this century." Based on that statement, plaintiffs' attorney argued to the jury that Borden laid off plaintiffs because they were older and would not be working when the business turned around in the year 2000. Plaintiffs now argue that the district court erred in rejecting this theory as "rank speculation." However, the court of appeals did not mention this evidence or any other evidence elicited on cross-examination of defense witnesses as a basis for reversing the judgment n.o.v.

Plaintiffs fail to address the crucial point made by the district judge; they did not offer any evidence refuting the reasons given by Borden for his decision to eliminate the job of NE. Plaintiffs assert that they offered affirmative evidence challenging the business justifications offered by Mr. Borden. They do not, however, point to any such affirmative evidence but instead merely argue that the jury was free to disbelieve Borden's testimony.

Plaintiffs also argue that it is significant that there was not any documentary evidence supporting Borden's testimony. The ADEA, however, does not require an employer to maintain written justifications for its actions. As the district court judge pointed out, plaintiffs did not submit any evidence establishing that Westinghouse customarily maintains written documents regarding its employment decisions. Absent such evidence, the failure of the company to keep writings regarding the elimination of the NE position is not remarkable and is certainly not evidence of age discrimination.

IV. The District Court's Assessment of the Expert Evidence was Proper and Correct

Plaintiffs also argue that the district court impermissibly weighed the credibility of plaintiffs' expert witness. While it is true that in considering a motion for judgment n.o.v., a court may not weigh evidence or evaluate witness credibility, it must nonetheless determine "[i]f *reasonable* minds could differ as to the import of the evidence . . ." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 246, 252 (1986) (Emphasis supplied). This determination necessarily involves some evaluation of the evidence.

Plaintiffs contend that the trial judge abused his discretion when he rejected the testimony of plaintiffs' expert. However, the trial judge's conclusion that Dr. Andrulis' comparison of older employees in one job group with older employees in another necessarily could *not* prove age discrimination is consistent with his duty to decide if the evidence is such that *reasonable* minds could differ as to its import. If Dr. Andrulis had testified that he believed that one and one equals three, the jury would not have been free to accept this obviously erroneous opinion.

Plaintiffs cite the opinion in *Borras v. Sea-Land Service, Inc.*, 586 F.2d 881 (1st Cir. 1978), as support for their contention that the trial judge's assessment of the testimony of Dr. Andrulis was improper. The *Borras* decision, however, is clearly distinguishable. In *Borras*, the trial court rejected the opinion given by plaintiff's expert. By contrast, in this case, the trial judge faulted the clearly erroneous methodology used by Dr. Andrulis (*i.e.*, the comparison of the treatment of older employees with other older employees) and the opinion resulting from it.

A decision which is more relevant to the issues presented by the instant case is *EEOC v. Federal Reserve Bank of Richmond*, 698 F.2d 633 (4th Cir. 1983), *rev'd*

on other grounds, 467 U.S. 867 (1984). In that case, which involved allegations of race and sex discrimination in employment, the district judge found in favor of plaintiffs. The Fourth Circuit reversed, finding, *inter alia*, that the trial judge had erred in accepting the opinion of plaintiffs' expert statistician because his ". . . opinion rested on such skewed analysis and . . . disregarded the far more reliable tables . . . which demonstrated no basis for finding of statistical significance, much less legal significance." *Id.* at 661-62.

CONCLUSION

For all of the reasons stated in the petition and in this reply brief, the petition for writ of certiorari should be granted.

/s/ Dona S. Kahn

June 1, 1988

Dated

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